MOTION FILED
APR 10 1997

No. 96-1428

(4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC., and
PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

—v.—

MAYOR and CITY COUNCIL OF
THE CITY OF BALTIMORE, *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONERS

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Counsel for Association of National Advertisers, Inc., as Amicus Curiae

12 pp

Motion for Leave to File Brief *Amicus Curiae* in Support of Petitioners

1. Pursuant to Supreme Court Rule 37.2(b), the Association of National Advertisers, Inc. (ANA) respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioners have consented to the filing of this brief. Respondents have declined to grant consent. The last day to file a brief in opposition herein is April 10, 1997.

2. ANA is the industry's oldest trade association, and the only organization exclusively dedicated to serving the interests of businesses that advertise regionally and nationally. ANA's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 5,300 separate advertising entities, ANA's member companies market a kaleidoscopic array of products and services to consumers and other businesses.

3. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace. ANA has appeared as *amicus curiae* in this Court in numerous cases involving commercial speech, and, with the consent of all parties, has filed briefs *amici curiae* in support of petitioners in the Fourth Circuit and in connection with this Court's earlier consideration of this case.

4. ANA is mindful of the nature of a motion for leave to file a brief *amicus curiae* at the certiorari stage. The First Amendment issues affecting ANA members raised by the petition in this case are, however, so critical to the continued viability of constitutionally protected commercial speech that *amicus* participation at the certiorari stage appears appropriate, despite the refusal of respondents to grant consent.

Accordingly, counsel respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
April 9, 1997

/s/ BURT NEUBORNE
Burt Neuborne
(*Counsel of Record*)
40 Washington Sq. South
New York, New York 10012
(212) 998-6172

Attorney for ANA

TABLE OF CONTENTS

	PAGE
Reasons for Granting the Writ	1
I. THE COURTS BELOW FAILED TO PERMIT THE DEVELOPMENT OF THE FACTUAL RECORD NEEDED TO ASSESS THE IMPORTANT FIRST AMENDMENT CLAIMS RAISED HEREIN	1
II. BALTIMORE APPEARS TO HAVE IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE WIDESPREAD CENSORSHIP ON THE ENTIRE COMMUNITY	4
Conclusion	7

TABLE OF AUTHORITIES

Cases	PAGE
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	4
Butler v. Michigan, 352 U.S. 380 (1957)	4
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)	2, 3
Edenfield v. Fane, 507 U.S. 761 (1993)	2, 3
44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996)	2
Ibanez v. Florida Dep't of Business and Professional Regulation, 114 S.Ct. 2084 (1994)	2, 3
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	2, 3
Posadas de Puerto Rico Assoc. v. Tourism Co of P.R., 478 U.S. 328 (1986)	1
Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995)	5
Sable Communications Co. v. FCC, 492 U.S. 115 (1989)	4
Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994)	2
Turner Broadcasting System, Inc. v. FCC, 117 S.Ct. ___, 65 USLW 4209 (March 31, 1997)	3
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	5

Reasons for Granting the Writ

The courts below refused to permit the development of the factual record needed to assess Baltimore's claim that a massive program of content-based censorship of lawful speech aimed at adults is necessary to protect children. Accordingly, *amicus* respectfully requests the Court to grant a writ of certiorari, summarily reverse the decision below, and remand the case to the District Court to permit the development of the factual record needed to assess the important First Amendment issues raised herein.

I. THE COURTS BELOW FAILED TO PERMIT THE DEVELOPMENT OF THE FACTUAL RECORD NEEDED TO ASSESS THE IMPORTANT FIRST AMENDMENT CLAIMS RAISED HEREIN

Despite repeated warnings from this Court that content-based efforts to ban truthful commercial speech about a lawful product must be based on a substantial factual showing of necessity and efficacy, the Fourth Circuit persisted in refusing to remand this matter to the District Court to permit the development of a record testing the factual justification for Baltimore's massive exercise in censorship. 101 F.3d 325 (4th Cir. 1996).

The District Court, relying upon now-discredited dicta in *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), dismissed petitioners' complaint without affording petitioners an opportunity to challenge the factual underpinnings of Baltimore's decision to impose severe restrictions on outdoor advertising of beverages containing alcohol. The District Court deemed judicial fact-finding unnecessary, since, under *Posadas*, it elected to defer wholly to the conclusory "findings" of the Baltimore City Council, announced after one day of so-called "hearings". 855 F. Supp 11 (D. Md. 1994). The Fourth Circuit, also relying on

Posadas, affirmed the District Court's refusal to permit a factual hearing. 63 F.3d 1305 (4th Cir. 1995). After this Court's partial repudiation of *Posadas* in *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), this Court vacated the Fourth Circuit's decision, and remanded the matter to the Fourth Circuit for reconsideration. 116 S.Ct. 1821 (1996). A divided panel of the Fourth Circuit, with Judge Butzner dissenting, once again refused to remand the matter to the District Court to permit the development of a factual record. The panel's majority reasoned that, even after the partial repudiation of *Posadas* in *44 Liquormart*, it was unnecessary to subject Baltimore's assertion that a far-reaching ban on outdoor advertising of beverages containing alcohol is necessary to protect children to serious factual scrutiny by the courts. Rather, the panel below persisted in deferring to the findings of the Baltimore City Council, without permitting those findings to be challenged in an adversary proceeding.

At no time during these proceedings have the factual underpinnings of Baltimore's decision to embark on a massive scheme of content-based censorship been subjected to meaningful scrutiny in a court of law. Instead of the searching judicial review of the factual justification for content-based censorship that is a hallmark of the modern First Amendment, the panel of the Fourth Circuit below, in disregard of repeated holdings of this Court, asked merely whether the Baltimore City Council had articulated a facially plausible justification for its decision to impose massive, content-based censorship. Eg. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

But the heart of modern First Amendment protection is a rigorous, independent review by the judiciary of the factual underpinnings of any decision to censor protected speech. Eg. *Turner Broadcasting System, Inc., v. FCC* 114 S.Ct. 2445 (1994); *Landmark Communications, Inc,. v. Virginia*, 435 U.S.

829 (1978). As this Court held in *Turner Broadcasting I*, the judiciary is obliged to conduct an independent review of the legislature's factual basis for censorship in order to assure that First Amendment rights are adequately preserved, even when such an independent review brings the judiciary into conflict with Congress. The Court's intense commitment to serious judicial scrutiny of the factual basis for censorship was reaffirmed in each of the opinions in *Turner Broadcasting System v. FCC*, 117 S.Ct. ____, 65 USLW 4209 (March 31, 1997) (*Turner Broadcasting II*). While members of the *Turner Broadcasting II* Court disagreed over whether the government's extensive factual showing was sufficient, all agreed that appropriate resolution of the First Amendment issues required careful attention to a factual record developed in the context of an adversary judicial proceeding. Unfortunately, the courts below abdicated their responsibility to develop a record testing the factual basis for Baltimore's massive exercise in censorship. 63 F.3d at 1311-12. Instead, the court below asked merely whether the Baltimore City Council could have held a rational belief that its censorship scheme had a "logical nexus" to the problem of underage drinking. *Id* at 1313-1314. But such an unduly deferential "rational basis" standard confuses judicial review of censorship of speech with judicial review of the regulation of behavior and has been explicitly rejected by this Court in commercial speech cases. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

II. BALTIMORE APPEARS TO HAVE IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE WIDESPREAD CENSORSHIP ON THE ENTIRE COMMUNITY

The refusal of the courts below to permit serious exploration of the factual underpinnings of Baltimore's speech ban is particularly disturbing because, as Baltimore concedes, its sole basis for censorship is the alleged impact of outdoor advertising—no matter what its content; no matter what its location—on children. Thus, Baltimore asserts the power to engage in massive censorship of lawful speech directed at adults on the basis of an ostensible belief that the speech is harmful to children, without subjecting the factual underpinnings of that belief to judicial scrutiny in an adversary proceeding. The net result has been massive censorship of adults, with no serious factual inquiry into whether widespread censorship is actually necessary to protect children, or whether less drastic approaches exist that would permit delivery of the speech to adults while adequately protecting children.

Amicus recognizes the significant societal interest in protecting children. It is no coincidence that many of the difficult free speech issues of our time involve efforts to regulate speech directed at adults in the name of protecting children. Whether one is concerned with sexually explicit speech on the Internet, violence on television, or billboards in Baltimore, the First Amendment challenge is the same—to assure that legitimate concern for children does not inadvertently ripen into a blueprint for the widespread censorship of adults. Eg. *Butler v. Michigan*, 352 U.S. 380 (1957); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Sable Communications Co. v. F.C.C.*, 492 U.S. 115 (1989).

The best—perhaps the only—way to lessen the tension between a robust First Amendment and an understandable desire to shield children from allegedly harmful speech is meticulous attention to facts. Under the Courts' jurispru-

dence, a claim that otherwise lawful speech harms children must be proven in a court of law, not merely asserted at a legislative hearing. Similarly, a claim that widespread, prophylactic censorship of adults (as opposed to a more narrowly targeted protective device) is necessary to protect children must be factually demonstrated, not merely asserted. But Baltimore's pervasive censorship scheme cannot be defended on grounds of either efficacy or necessity because it is both over- and under-inclusive. While *amicus* does not believe that persuasive data exists identifying outdoor advertising as a material cause of underage drinking,[1] even if one assumes for the sake of argument that some children might be unduly influenced by certain outdoor advertisements, no factual basis exists to propose an over-inclusive ban on all off-site outdoor advertisements for alcohol in Baltimore's residential neighborhoods.

Conversely, the inexplicable underinclusiveness of Baltimore's censorship scheme reinforces the suspicion that concern with children is being used as a cover for censorship of adults. A censorship scheme genuinely designed to protect children simply would not exempt advertisements in Camden Yards and Memorial Stadium, or on public transportation. The internal contradictions of a censorship scheme that claims to protect children by *exempting* advertisements in ballparks, in downtown shopping malls, and on the buses children ride to school makes it all but impossible to take Baltimore's child protection rationale seriously. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Unfortunately, the lax procedural approach endorsed by the panel of the Fourth Circuit below—an approach that is affirmatively hostile to judicial fact-finding—makes it impossible

---

[1] In 1985, the Federal Trade Commission rejected the identical argument, finding that no persuasive data linked advertising to underage abuse of alcohol. The FTC study, among others, is described in the Joint Appendix submitted to the Fourth Circuit. JA 175-76; 1177-78.

to conduct the serious judicial inquiry needed to prevent an ostensible concern for children from becoming a convenient Trojan Horse for pervasive censorship of the society at large. It is possible, as Judge Butzner noted below, that, despite a contrary finding by the Federal Trade Commission in 1985, Baltimore will be successful in demonstrating that all forms of outdoor advertising for beverages containing alcohol, regardless of content or location, actually do function as a material cause of underage drinking. Moreover, on remand, it is possible that Baltimore will be successful in demonstrating that nothing short of a massive restriction on outdoor advertising will adequately protect children; while, at the same time, defending the rationality of exempting ball parks, shopping malls, and school buses from the ban.

Thus far, however, Baltimore has been permitted to impose its censorship scheme without subjecting its factual assertions about necessity and efficacy to judicial review in an adversary proceeding. Such a casual approach to First Amendment judicial fact-finding simply cannot be squared with this Court's repeated reminders that careful assessment of the factual underpinnings of censorship is the heart of the modern First Amendment.

Conclusion

Accordingly, *amicus* respectfully suggests that the panel decision below be summarily reversed on the basis of Judge Butzner's dissent, and the matter remanded to the District Court for the development of a factual record that will make it possible to assess Baltimore's censorship scheme using reason, not mere intuition.

Dated: New York, New York
April 9, 1997

Respectfully submitted,

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for ANA